No. 15,251

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW BING KEW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

The appeal is from a judgment (T. 14) of the United States District Court for the Northern District of California, Northern Division, adjudging the appellant guilty on two counts of a criminal indictment charging violation of 18 U.S.C., Section 911 and 18 U.S.C., Section 1001.[1]

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[1]Sec. 911. "Whoever falsely and wilfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Sec. 1001. "Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and wilfully falsifies, conceals or covers up, by any trick, scheme or device, a material fact or makes any false, fictitious or fraudulent statements or representations * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Jurisdiction for the trial of such offenses is conferred upon the Court below by 18 U.S.C., Section 3231. Jurisdiction to review the judgment of the Court below is conferred upon this Court by 28 U.S.C., Section 1291.

STATEMENT OF THE CASE.

The appellant is a citizen of China who came to this country in 1929 at the age of 17 and was lawfully admitted for permanent residence. In the ensuing years he became successful in business, and at the time of the events described in the indictment was a member of the firm of Daylite Markets, a partnership which operated six supermarkets in various cities in California (T. 131, 97, 98), and as president of several corporations was engaged in various other legitimate business enterprises (T. 110).

(a) The first count of the indictment.

Count one of the indictment charges that on January 18, 1952, appellant falsely represented himself to be a citizen of the United States in violation of 18 U.S.C. Section 911 (T. 3). In the language of the Court below:

> "The Government's proof on this count consisted of an application for a California alcoholic beverage license filed January 18, 1952, signed by the defendant. In response to a question contained in the application, 'Are you a citizen of the United States?' the word 'yes' had been

typed. Defendant admits he is not a citizen of the United States" (T. 5).[2]

The uncontradicted testimony with regard to this alleged violation is that the witness Carlos W. Helton, who was Supervisor of Stores in charge of the various markets operated by the concern, finding it necessary to arrange for renewal of an off-sale alcoholic beverage license for the concern's store at Oakley, California (a matter which was within his duties as supervisor of the various stores), went to the area office of the California State Board of Equalization at Martinez, California, for that purpose (T. 97-98). A clerk in the office of the said Board typed up a form for Mr. Helton and advised him that it would be necessary to have an officer of the concern sign it[3] and that it should then be mailed to Sacramento (T. 99). Witness Helton took the typed form back to Stockton, had appellant sign it, took it to a notary public, had it notarized (T. 99), and mailed the document as instructed (T. 100). Witness Helton testified that appellant did not read the form before signing it (T. 99-101). This testimony is uncontradicted. Appellant testified to the same effect (T. 124-125). Appellant signs two or three hundred business documents per week (T. 125).

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[2]A reproduction of the application appears at page 30 of the transcript. The various deletions and interlineations on the document were made some time after it was filed with the Board of Equalization (T. 99).

[3]The concern was a partnership (T. 100), and although the form in such circumstances called for the names "of all partners," only appellant's name was typed on this form.

The foregoing is the uncontradicted evidence with reference to the alleged violation of 18 U.S.C. Section 911 which is set forth in count one of the indictment.

Section 911, supra, applies, by its express terms, to a representation which is "*wilfully*" made. In overruling the appellant's motion for judgment of acquittal, the trial Court held that appellant "is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality" (T. 8).

The effect of this ruling of the Court below is to hold that one may "*wilfully*" violate the statute by mere carelessness, as distinguished from consciousness and design. Therein, we believe, on the basis of authorities herein cited, the trial Court applied an erroneous rule of law and erred in denying the motion for judgment of acquittal on this count.

(b) The second count of the indictment.

Count two of the indictment (T. 3-4) charges that on or about April 14, 1953, appellant "did unlawfully, knowingly, and wilfully falsify, conceal, and cover up by trick, scheme, and device a material fact and made a false, fictitious, and fraudulent statement or representation to Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice, a department of the United States, by telling him he was a citizen of the United States of America * * *." Thus, the indictment alleges (a) that the statement was made to

Anderson, and (b) that Anderson was an investigator of the named agency. It is not alleged that it was made while Anderson was acting in a *"matter within the jurisdiction of"* that agency. For reasons hereinafter discussed, we believe not only that this count fails to charge an offense under Section 1001, supra, but also that the proof offered does not establish that such an offense was committed.

The Government's proof on this count is that the witness Anderson, on receiving information that appellant claimed to be a native-born citizen of the United States but actually was Jue Bing Cue who was born in China and had come to this country about 1929, searched the immigration records and found a file pertaining to the entry of one Chow Bing Kew into the United States in 1929 (T. 35-36); that he thereupon went to appellant's place of business in Stockton (T. 37, 41) and, after identifying himself, told appellant that he had received information that appellant was not a citizen of the United States and that he was there to check with him to find out (T. 41-43). Anderson's testimony is that appellant then said he was a citizen of the United States and was born in Sacramento (T. 43). Anderson did not at that time administer an oath to appellant (T. 67), did not then take a recorded statement (T. 82), did not then inform appellant of any rights the latter might have in connection with making any statement, but testified that "we do that before we take a formal statement" (T. 77). It was not done at that time (T. 77-78). The regulations, as we shall hereinafter show,

required that all these things be done in connection with such a statement, and statements taken without compliance therewith could not be used in subsequent proceedings before the agency.

On a later date, viz., June 13, 1953, Witness Anderson called at appellant's office in Stockton with other investigators, and at that time a statement under oath was taken from appellant, recorded, transcribed, and signed in conformity with the regulations (T. 48). It is conceded that there was nothing untrue in the statement then made (T. 73).

(c) The proceedings in the Court below.

The case was tried without a jury, and following the trial the Court denied motions for judgment of acquittal as to both counts (T. 5-14). Motion in arrest of judgment was then made on the ground that the indictment does not state facts sufficient to constitute a crime against the United States, and this motion, together with motion for a new trial (T. 15-16), was likewise denied (T. 19). The appellant was sentenced on the first count to imprisonment for 18 months and fined $1,000, and on the second count to imprisonment for 18 months and fined $5,000, sentences to run concurrently (T. 21-22).

(d) The questions involved.

The questions involved on this appeal may be succinctly stated as follows:

(1) Did the Court below apply an erroneous rule of law in finding appellant guilty of wilfully violating

18 U.S.C. Section 911 under count one of the indictment?

(2) Was the evidence sufficient to sustain the conviction on that count?

(3) Does the indictment, in count two thereof, state facts sufficient to constitute a violation of 18 U.S.C. Section 1001?

(4) Does the proof establish that the alleged misrepresentation charged in count two was made in a matter within the jurisdiction of an agency or department of the United States, within the meaning of Section 1001, supra?

(e) Specification of errors.

Following are the errors intended to be urged by appellant:

(1) The trial Court erred in denying appellant's motion for a judgment of acquittal under count one of the indictment, in that

(a) The Court applied an erroneous rule of law in holding that carelessness on the part of appellant would be sufficient to sustain a conviction of the offense charged;

(b) The uncontradicted evidence relative to count one establishes that there is no wilful misrepresentation on appellant's part.

(2) The trial Court erred in denying appellant's motion for a judgment of acquittal on count two of the indictment, in that the evidence did not establish that the alleged concealment or misrepresentation was

made in a matter within the jurisdiction of a department or agency of the United States within the meaning of 18 U.S.C. Section 1001.

(3) The trial Court erred in denying appellant's motion in arrest of judgment as to count two of the indictment, in that said count does not charge facts constituting an offense under 18 U.S.C. Section 1001 since it is not charged that the alleged concealment or misrepresentation was made in a matter within the jurisdiction of a department or agency of the United States.

ARGUMENT.

I.

THE EVIDENCE DOES NOT SUSTAIN THE CONVICTION ON COUNT ONE.

(a) The uncontradicted testimony shows that there was no wilful violation.

Count one of the indictment is based upon 18 U.S.C. Section 911, which provides as follows:

> "Whoever falsely and wilfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Thus, it is a specific element of the offense that the representation be "wilfully" made.

In *Spurr v. United States,* 174 U.S. 728, 19 S.Ct. 812, 815, 43 L.Ed. 1150, the Supreme Court said:

> "The significance of the word 'wilful' in criminal statutes has been considered by this Court. In

> Felton v. United States, 96 U.S. 699, 702, it was said: 'Doing or omitting to do a thing knowingly and wilfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it * * *.' "

As stated elsewhere in that opinion, the presence of the word "wilful" in a penal statute "cannot be regarded as mere surplusage; it means something. It implies * * * knowledge and a purpose to do wrong."

To constitute a wilful violation, something more is required than the doing of the act (*Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, 1502).

> "A 'wilful' act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. * * *. A wilful differs essentially from a negligent act. The one is positive and the other negative (citing authorities). Simple negligence arises merely from heedlessness, and consists simply of facts of nonfeasance, and is therefore incompatible with wilfulness, which comprises acts of aggressive wrong * * *."
>
> *Black's Law Dictionary* (3d Edition), p. 1848.

The alleged misrepresentation which is the subject of count one of the indictment consists of the typewritten answer "yes" to the question "Are you a citizen of the United States?" in the application for off-sale beer and wine license which appellant signed (T. 30). The uncontradicted evidence shows that this

document was typed by a clerk in the area office of the State Board of Equalization at Martinez, California, when the witness Carlos W. Helton called at that office in connection with his duties as Supervisor of Stores for the Daylite Markets, for the purpose of renewing a liquor license for one of the six stores operated by that concern (T. 97-99). At that time the concern was a partnership (T. 100), consisting of about 14 or 15 partners (T. 101). The young lady who typed the application form in the office of the Board of Equalization at Martinez told Witness Helton it would be necessary to get an officer of the concern to sign it and that it should then be mailed to Sacramento (T. 99). Witness Helton took the typed form back to Stockton, had appellant sign it, took it to a notary public, had the signature notarized (T. 99), and mailed it as directed (T. 100). With regard to appellant's signing the form, Witness Helton testified as follows:

"Q. Did Mr. Wahyou read that document when he signed it?

A. No, he did not.

Q. You have handled many of those documents, have you not?

A. Yes, I have.

Q. You give him many documents from my office to sign?

A. That is right." (T. 97-99)

* * * * * * *

"Q. Mr. Helton, you have stated that Mr. Wahyou did not read that application?

A. No, he didn't, sir.

Q. Did you stand there and watch him sign it?

A. I did.

Q. And you are sure he didn't read it?

A. That is right. I am sure of that, sir." (T. 101)

The foregoing testimony is uncontradicted. The appellant also testified that he did not read this document before he signed it (T. 125).

Under the circumstances disclosed by this uncontradicted evidence, we submit that the proof is insufficient to sustain a judgment of guilty on the first count of the indictment. It is unquestionable that the affirmative answer to the question under discussion was typed upon the application form by the clerk of the area office of the Board. It is also indisputable that appellant was not present when this was done. It is shown beyond any doubt that the arrangements in connection with this application were personally made by Witness Helton in the discharge of his duties as Supervisor of the various stores operated by the concern[4]. The uncontradicted testimony is that appellant signed the completed form at the request of Witness Helton without reading its contents. Not only is the evidence all one way on this point, but the

[4]Although the applicant for the license was a partnership (T. 100) and the form called for the names of all partners, only appellant's name was typed on the form (T. 30). The omission of the names of the other partners (which the form required to be stated), and the fact that citizenship is not a requirement for an off-sale liquor license but is required only for on-sale licenses (California Business and Professions Code, Section 23788), illustrates the informality with which the form was prepared.

testimony in that regard is wholly reasonable. The evidence shows that Witness Helton, as Supervisor of Stores, normally takes care of preparation of documents, obtaining licenses, and such duties (T. 97), and that he gives appellant many documents to sign (T. 100). It is shown that appellant is active in a large number of different business enterprises (T. 110), that he signs two or three hundred documents per week, and whether he reads them first depends on the source and nature of the specific document (T. 125).

It is well-settled that the burden is on the prosecution to establish beyond a reasonable doubt every essential element of the offense, including criminal intent (*Minner v. United States* (CA 10), 57 F.2d 506, 512). The latter element in the case at bar requires evidence that the appellant intentionally made the representation as to citizenship which is contained in the application form, i.e., that the representation was due to wilfulness on his part rather than inadvertence, carelessness, or neglect. Evidence which is as consistent with innocence as with guilt, and which fails to show wilful intent, will not sustain a conviction (*Candler v. United States,* (CA 5), 146 F.2d 424, 426).

In the case at bar, the uncontradicted evidence is that appellant signed the document without reading it, under circumstances which, while they may have amounted to carelessness on his part, fell far short of establishing an intentional and wilful misrepresentation. Indeed, the Court's statement in ruling

on the motion for judgment of acquittal that "appellant is in no position to relieve himself of criminal responsibility because of claimed ignorance; on the contrary, his brash carelessness, if such be the case, emphasizes his criminality" (T. 8), would seem to make it clear that the Court found the appellant guilty on the first count of the indictment on the basis of the Court's belief that even if the act was done carelessly rather than intentionally, guilt would be established. Under authorities cited in the succeeding portion of this brief, we submit that the Court thereby applied a rule of law which the United States Supreme Court and this Court have held to be erroneous under analogous circumstances.

(b) The conviction of appellant on count one was erroneous in law.

In *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, the Supreme Court said:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."

In *Bloch v. United States,* 221 F.2d 786 (rehearing denied 223 F.2d 297), this Court applied the doctrine of the *Morissette* case, supra, to a conviction for "wilfully" attempting to evade taxes (26 U.S.C. Section 145(b)), and held an instruction erroneous which stated that wilfulness includes "doing an act without justifiable excuse," or "without ground for believing that the act is lawful," or "with a careless disregard for whether or not one has the right so to act."

So also the Court of Appeals for the Third Circuit, considering a similar charge in *United States v. Martell,* 199 F.2d 670, 672, said:

> "A wilful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one."

In *Morissette v. United States,* supra, the appellant, a scrap iron dealer, had taken a truck load of metal casings from Government property and sold them. The defendant testified at the trial that he thought the casings had been abandoned. The trial Court had held that this would constitute no defense, since the taking was intentional and the element of intent was presumed from the act of taking. In reversing the judgment, the Supreme Court went on to say:

> "It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. * * * A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense."

In that connection, the Court also used the following expressive language:

> "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute."

We submit that the conviction of appellant on count one of the indictment was erroneous in law, in that the Court concluded that carelessness on the part of appellant would be sufficient to constitute a violation of the statute.

II.

THE CONVICTION ON COUNT TWO CANNOT BE SUSTAINED.

Appellant earnestly contends that a violation of 18 U.S.C. Section 1001 as a matter of law was not only not sufficiently alleged in the indictment but was not established by the proof.

We shall consider the proof first, since if the facts do not establish the violation it will be unnecessary to consider the sufficiency of the pleading to charge such a violation.

(a) The alleged statement is not within the purview of 18 U.S.C. 1001.

The pertinent provisions of Section 1001, supra, are as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and wilfully falsifies, conceals or covers up, by any trick, scheme or device, a material fact or makes any false, fictitious or fraudulent statements or representations * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

It is charged in the indictment that appellant did "falsify, conceal and cover up by trick, scheme and device a material fact and made a false, fictitious and fraudulent statement or representation to Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice, a department of the United States * * *" (T. 4).

Except for the reference to Anderson as "an investigator of" the named agency, it is not alleged in the indictment that the statement charged was made in a matter within the jurisdiction of the agency, nor that Anderson was acting in such a matter when the statement was made to him. For reasons hereinafter set forth, we submit that Anderson was not so acting at that time within the meaning of Section 1001, supra.

Preliminarily, we would point out that the powers of officers and employees of the Immigration and Naturalization Service and the procedures governing matters within the jurisdiction of that agency are prescribed, limited and controlled by specific provisions of statute and regulations.

Section 287 of the Immigration and Nationality Act of 1952 (8 U.S.C. Section 1357) provides as follows:

> "(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have the power without warrant—
>
> (1) To interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; * * *"

Thus, an officer or employee of the Service has power to interrogate only as authorized under the regulations prescribed by the Attorney General, and in accordance therewith.

Sections 242.11 and 242.12 of Title 8 of the Code of Federal Regulations provide as follows:

> "Sec. 242.11. *Investigations—(a) Persons believed to be subject to deportation.* The case of every person believed to be subject to arrest and deportation shall be investigated by such officer as may be designated for that purpose.
>
> (b) *Purpose of investigation.* The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there is credible evidence reasonably establishing that the person investigated is an alien and that he is subject to deportation.
>
> (c) *Recorded statements.*—Whenever, in the course of an investigation, information is obtained which indicates that the person investigated is subject to arrest and deportation, and it is desired to use such information as evidence

in support of an application for a warrant of arrest, such information shall be reduced to writing either in narrative or question-and-answer form and signed by the person furnishing the information. Whenever such recorded statement is to be obtained from any person, the investigating officer shall (1) identify himself to such person, (2) warn the person that any statement made by him may be used as evidence against him in any subsequent proceeding, and (3) place the person under oath or affirmation.

(d) *Refusal to make, or refusal or inability to sign a statement.* Whenever, in the course of an investigation, admissions or statements are obtained from the person under investigation or statements are made by any other person which indicate that the person investigated may be subject to arrest and deportation, but there is a refusal to make a statement under oath or affirmation, or a refusal or inability to sign the statement by name or by mark, the investigating officer shall make a report setting forth the facts admitted or stated. Such report, with any unsigned or unsworn statement which has been reduced to writing, may be used in support of an application for a warrant of arrest if the investigating officer certifies that no other evidence to establish the facts stated in the report can readily be obtained.

Sec. 242.12. *Application for warrants of arrest.* If, after preliminary investigation, the investigating officer determines that a prima facie case for deportation of an alien exists, he shall apply for a warrant of arrest to an officer having authority to issue warrants of arrest.''

Thus, under the statute and regulations, an immigration officer, in obtaining information or statements for possible use in a deportation proceeding before the agency, must take a recorded and signed statement under oath, after giving the person to be interrogated the advices specified in the regulations. If the person under investigation refuses to make a statement under oath or refuses to sign such a statement, the investigating officer is required to make a report setting forth the facts admitted or stated, and under those circumstances such a report may be used in support of an application for a warrant of arrest if "no other evidence to establish the facts stated in the report can readily be obtained."

It is well settled that a statement obtained without compliance with the aforesaid provisions of the regulations cannot be used in a deportation proceeding (*Bridges v. Wixon,* 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103).

In the *Bridges* case the alien was ordered deported on the basis of a statement of another individual, which although recorded was not under oath nor signed, and thus had been taken without compliance with a then existing regulation practically identical with paragraph 242.11, supra, of the present regulations. In holding that the statement could not be used or considered in the deportation proceeding, the Supreme Court said:

> "The rules are designed to protect the interests of the alien and to afford him due process of law."

* * * * * * * *

> "It was assumed in U.S. ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155; 68 L.Ed. 221, 224; 44 S.Ct. 54, that 'one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.' We adhere to that principle. For these rules are designed as safeguards against essentially unfair procedures. The importance of this particular rule may not be gainsaid. A written statement at the earlier interviews, under oath and signed by O'Neil, would have afforded protection against mistakes in hearing, mistakes in memory, mistakes in transcription."

These considerations have since been emphasized by the enactment of the Immigration and Nationality Act of 1952. The legislative history of that statute shows that one of its purposes was to provide "for fair administrative practice and procedure," specific mention being made, *inter alia,* of Section 242 of the statute (1952 U.S. Code Congressional and Administrative News, p. 1679). Section 242 thereof (8 U.S.C. Section 1252) thus provides that "determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer," that "no special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions," that "proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall pre-

scribe," that such regulation "shall include" requirements for (1) reasonable notice of the charges, (2) representation by counsel, (3) reasonable opportunity to the alien to examine the evidence against him, and (4) that no decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence, and that "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

It is clear from the statute, therefore, that in a deportation matter the sole and exclusive procedure is to be that which is prescribed by the regulations promulgated pursuant to Sections 242 and 287, supra. We submit that in order to constitute a statement made in a matter within the jurisdiction of the Service for purposes of 18 U.S.C. Section 1001, supra, the statement must have been made to an immigration officer or employee while said officer or employee is acting in accordance with the procedure so prescribed and required. It is not the mere employment status or title of the officer or employee which renders punishable the making of a false statement to him; on the contrary, such a statement is punishable only if he is acting in a "matter within the jurisdiction of" the agency. He cannot be acting in such a matter if, when the statement is made, he is not following a procedure within the purview of the statute and regulations from which he derives his authority, and when any statement so made to him cannot under those regulations be used or considered in such a matter.

We proceed to examine the circumstances under which the false statement set forth in count two of the indictment is said to have been made. Information had been received by the Stockton immigration office that appellant claimed to be a native-born citizen of the United States but in fact was one Jue Bing Cue, a native of China who had come to this country about 1929 (T. 36). Anderson located a record of the arrival of such a person in 1929 (T. 36-37). Anderson then went to appellant's place of business in Stockton (T. 41), taking the arrival file with him, and after identifying himself to appellant "told him I was there because we had received information that he was not a citizen of the United States" (T. 41) and that "I was there to check with him to find out" (T. 43). Anderson's testimony is that appellant then said he was a citizen of the United States and was born in Sacramento (T. 43). Anderson did not administer an oath (T. 67), did not record a statement (T. 82), and did not inform the appellant of any rights he might have, but testified that "we do that before we take a formal statement" (T. 77-78).

Anderson again called at appellant's office two months later. At that time he took and recorded a statement under oath, in accordance with Section 242.11(c) of the regulations, supra, and appellant made a complete and correct statement, which contained no untruth (T. 73). According to Anderson's testimony, "that was a sworn statement, *the usual kind we take,* * * *. * * * Yes, it was typed and he was given an opportunity to read it and he signed—

he initialed each page of the typed statement and signed the last page of it" (T. 48). Anderson further testified, "We do that in all cases of this type, we take a statement from them" (T. 70).

Thus, when Anderson did take the *"usual"* statement, *in accordance with the regulations,* the appellant gave a full, complete and truthful statement (T. 73). The earlier "statement" which is the subject of count two of the indictment is alleged to have been made in a conversation of an informal character, without any compliance with the foregoing provisions of the regulations, and was not the "usual kind"[5].

The narrow question presented is whether any declaration made by appellant to Anderson in the informal conversation of April 14, 1953, was made in a "matter within the jurisdiction of" the Service within the meaning of Section 1001, supra. There was no deportation proceeding yet pending, and information gathered in such a conversation *could not have been used in such a proceeding* since it did not comply with the provisions of the regulations (8 C.F.R. Section 242.11; *Bridges v. Wixon,* supra). Thus, the interview was held in advance of, and in possible anticipation of, a proceeding before the agency, without, however, any compliance with the procedures prescribed by the regulations for taking preliminary statements for future use in such matter or proceed-

[5]While Anderson made brief notes for his own use, even those notes contain no mention of the particular statement charged in count two of the indictment (T. 69).

ing. Consequently, it is clear that the conversation which Anderson had with the appellant on April 14, 1953, was entirely exploratory on Anderson's part and not intended for use in such a matter. Nothing which was said there could have been used in a proceeding before the agency, because it did not comply with the requirements of the regulations which were necessary to permit it so to be used.

That immigration officers and employees have no broad inquisitorial powers not specifically granted to them by the statute and regulations is eminently clear from the recent decision of the United States Supreme Court in *United States v. Minker,* 350 U.S. 179, 76 S.Ct. 281, 100 L.Ed. 191. That case involved the question whether immigration officers could compel testimony from a person who was under investigation with a view to a possible denaturalization proceeding. The Government relied on the provisions of Section 235(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. Section 1225(a)) that any immigration officer "shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers * * * concerning any matter which is material to the enforcement of this chapter * * * and to that end may invoke the aid of any court of the United States." In holding that the subpoena power therein granted did not include the power to compel the appearance and testimony of prospective defendants in denaturalization suits, the Court pointed out that such a power is capable of oppressive use, especially when it may be indiscriminately

delegated; that "compulsory ex parte administrative examinations * * * afford too ready opportunity for unhappy consequences to prospective defendants in denaturalization suits," and that since Congress had not provided clearly that the subpoena power extends to persons who are the subject of denaturalization investigations, "therefore Congress is not to be deemed to have done so impliedly."

In his concurring opinion, Mr. Justice Black made the following pertinent observations:

> "Thus the capacity in which this immigration officer was acting was precisely the same as that of a policeman, constable, sheriff, or Federal Bureau of Investigation agent who interrogates a person, perhaps himself a suspect, in connection with murder or some other crime. Apparently Congress has never even attempted to vest FBI agents with such private inquisitorial power. Indeed, this Court has construed Congressional enactments as designed to safeguard persons against compulsory questioning by law enforcement officers behind closed doors (citing cases).
>
> * * * * * * *
>
> "A purpose to subject aliens, much less citizens, to a police practice so dangerous to individual liberty as this should not be read into the Act of Congress in the absence of a clear and unequivocal Congressional mandate."

It is crystal clear from the foregoing that the specific provisions of the statute and regulations are the measure of the power of immigration officers and employees, and that they have no implied power to

engage in inquisitions not specifically authorized by the statutes and regulations. It follows that unless an immigration officer or employee is proceeding in accordance with some authorized procedure prescribed in the law and regulations, it cannot be said that he is acting in "a matter within the jurisdiction of" the agency by which he is employed. We believe that in Section 1001 of Title 18, supra, the word "matter" is obviously used as the equivalent of the word "proceeding," and that it is only statements taken or submitted in the course of some authorized proceeding of the agency which can be said to be within the jurisdiction of the agency for purposes of that penal statute. We believe that mere informal exploratory questioning of prospective defendants by investigators under circumstances such as those shown in this case are not within the purview of Section 1001, supra.

There are two recent decisions which directly and forcibly support this view. In those cases the defendants had made false statements to agents of the Federal Bureau of Investigation in the course of investigations being conducted by that agency to determine whether there was ground for criminal prosecutions. In each case the defendant was charged with violating Section 1001, supra. In each case, after an exhaustive consideration of the legislative history and judicial decisions pertaining to that section, the Court held that the section was not to be construed to extend to cases involving information given or statements made in the course of exploratory interviews where the

agent is merely collecting facts or information to determine whether any action shall be taken by the agency.

United States v. Levin, 133 F.S. 88;
United States v. Stark et al., 131 F.S. 190.

In the *Levin* case Circuit Judge Pickett said:

"(1) If the statute is to be construed as contended for here by the United States, the results would be far-reaching. The age-old conception of the crime of perjury would be gone. 18 U.S.C.A. Sec. 1621. Any person who failed to tell the truth to the myriad of government investigators and representatives about any matter, regardless of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury. In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted. A literal construction of a statute is not to be resorted to when it would bring about absurd consequences, or flagrant injustices, or produce results not intended by Congress. Sorrells v. United States, 287 U.S. 435, 446, 53 S.Ct.

210, 77 L.Ed. 413. The lack of this intention is clearly illustrated from the fact that numerous statutes have been passed which authorize agents of different departments and agencies of the United States to administer oaths to those from whom they are seeking information." * * * "8 U.S.C. Sec. 152, now 8 U.S.C.A. Sections 1225(a), 1357(b) (Immigration inspectors with respect to aliens)"; * * *

"(2, 3) If Section 1001 is to be construed to extend to cases where false statements are made by a person not under oath, then the general perjury statutes and these special statutes would appear to be unnecessary. When the charge involves statements made when not under oath a reasonable and sensible construction of the statute would be to limit its application to persons under *legal obligation to speak* or to give information to representatives of an agency or department of the United States *who have authority to finally dispose of the matter being investigated,* and to cases where the keeping of records or the filing of documents are required or permitted by law. In other cases the perjury statutes are adequate." (Emphasis added.)

In the case of

United States v. Stark, supra,

the Federal Bureau of Investigation had received information to the effect that there had been bribery or attempted bribery of Federal Housing Authority personnel relative to FHA insured property which was being built by the defendants. Agents of the Bureau were detailed to investigate the matter, called

on the defendants, informed them of their rights, advised that any answers they might give might be used against them, placed them under oath, and proceeded to question them with regard to the matter under investigation. The defendants made false statements and were subsequently indicted under Section 1001, supra.

The Court in the *Stark* case made a very exhaustive review of the legislative history and the judicial precedents construing Section 1001, supra, and said:

> "Running through the whole Act there seems to be discussed the congressional purpose to (1) protect the government against false pecuniary claims and (2) as stated in the Gilliland case, to protect governmental agencies from perversion of their normal functioning. The purpose seems to be to protect the government from the affirmative or aggressive and voluntary actions of persons who take the initiative, or, in other words, to protect the government from being the victim of some positive statement, whether written or oral, which has the tendency and effect of perverting its normal proper activities. In the instant case the defendants did not volunteer information, they were not seeking any action by the government or making any claim upon it, or for action by its officers against other persons. In this respect the present case is quite distinguishable from any adjudicated case which has been called to my attention."
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> * * * * * * *
>
> "I conclude, therefore, that the legislative intent in the use of the word 'statement' does not fairly apply to the kind of statement involved in this

case where the defendants did not volunteer any statement or representation for the purpose of making claim upon or inducing improper action by the government against others. Nor were they legally required to make the statement."

The Court concluded that while the Federal Bureau of Investigation did have authority to investigate the subject of the confidential communication relating to the alleged bribery, the statement, under the particular situation there presented, was not one in a matter within the jurisdiction of the Bureau or the Department of Justice "within the meaning of that phrase as contained in Section 1001." The Court went on to say:

"The alleged false information given by the defendants to questions as to whether they had attempted to bribe or knew facts regarding bribery of a government official were not statements for the purpose of inducing action by the government and apparently could not have been the basis for the action actually taken in obtaining indictments for bribery and perjury; nor did the statements defeat the obtaining of such indictments. It seems quite inconsistent with our fundamental concepts of due process in the administration of criminal justice to abandon charges of bribery and perjury against the defendants, and then to indict them for previously denying their complicity therein, as a different separate substantive criminal offense under section 1001. The clear purpose of the section was to operate as a shield for defense rather than as a sword for attack.

> "The sweeping generality of the language of section 1001, especially when isolated as it appears in the 1948 revision from the remainder of the 1934 amendments, requires caution in applying it to particular situations. In my opinion it is not properly applicable here."

So in the case at bar the alleged false information given by appellant to Anderson's questions could not have been the basis for the action actually taken in subsequently commencing a deportation proceeding, nor did the alleged statements then made defeat the instituting of such proceeding. As pointed out above, nothing said to Anderson in that conversation could be used or considered in any proceeding to determine whether appellant was or was not deportable, or as a basis for initiating such a proceeding (8 C.F.R. Section 242.11, supra; *Bridges v. Wixon,* supra). Under the applicable regulations, Anderson was required to proceed in the following manner: Either (1) apply for a warrant of arrest on the basis of information and records obtained from sources other than appellant, or (2) take a statement from appellant in accordance with 8 C.F.R. Section 242.11(c), supra, under oath, advising the alien of the possible future use of any statement he might make, have such statement recorded and signed, as required by the regulations, and use such statement "as evidence in support of an application for a warrant of arrest," or (3) if appellant refused to make a statement under oath or to sign such a statement, make a report to be "used in support of an application for a warrant

of arrest," upon making the requisite certification "that no other evidence to establish the facts stated in the report can readily be obtained" (8 C.F.R. Section 242.11(d), supra). Anderson chose none of these courses. He elected to proceed without regard to the regulations (8 C.F.R. Section 242.11) and hold an informal conversation with appellant, which, under the regulations, could serve no official purpose or use in the matter (*Bridges v. Wixon,* supra).

The wisdom of the regulations is clearly shown by what happened in the case at bar. When Anderson returned and took the *usual* statement which *is* prescribed by the regulations, the truth was immediately forthcoming, and the interview elicited no misrepresentation of any sort. That in the previous informal conversation there was not even an attempt to obtain evidence for use in the contemplated deportation proceeding, is clear from two things: First, as has been pointed out above, any such statement so taken could not be used under the regulations, and, second, the basic information in Anderson's possession was that appellant was the person covered by the 1929 arrival file, but Anderson apparently made no attempt to inquire into the question of identity at that time. The conversation was thus no more than a casual effort to "feel out" the appellant.

For the reasons heretofore set forth, we submit that exploratory inquisitions made informally by an immigration employee in advance and in derogation of the procedure prescribed by the governing regulations, cannot be made the basis for prosecution

under Section 1001, supra. If statements are to be considered as made in a "matter within the jurisdiction of" the agency, obviously the statements would have to be made in accordance with procedures prescribed for the *use* of statements *in such matters* before such agency. To apply Section 1001, supra, to statements made in such informal exploratory conversations under the circumstances here presented would circumvent and do away with the procedures which have been prescribed by the regulations, and would constitute a perversion of the objectives of Section 1001, supra. The unfairness which would result is patent; it would mean, for example, that immigration officers and employees could utterly disregard the requirements which Congress in the statute and the Attorney General in the regulations have prescribed for the protection and safeguarding of the rights of aliens, would enable any such officer or employee to use Section 1001, supra, as "a sword for attack" (*United States v. Stark,* supra), and would give such employees an untrammeled authoritarian power far beyond any to which any judicial tribunal or legislative investigating committee has ever laid claim under our form of government. Indeed, the power of such employees of the executive branch would be comparable to that exercised in police states where absolute power is vested in the executive. We submit that the grossest injustice would be perpetrated by allowing an immigration employee to engage a suspected person in informal conversation, *in disregard of the regulations governing the taking and*

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use of statements in proceedings before the agency, and thereby render the alien subject to a long term of imprisonment and large fine, such as was imposed in this case, because the alien falsely protests his innocence under those conditions.

The case of *United States v. Moore,* (CA 5), 185 F.2d 92, furnishes further support for the proposition that statements obtained in "exploratory searches" are not within the purview of Section 1001, supra.

In that case the indictment charged that "in a matter within the jurisdiction of the Wage and Hour Division" during the course of an inspection of their business, duly authorized under the Fair Labor Standards Act, the defendants falsified, concealed, and covered up material facts. The District Court had granted a motion to dismiss the indictment on the ground that the falsification was not shown to be in a matter within the jurisdiction of the agency. In considering the matter on appeal, the Court of Appeals said, with reference to former Section 80 (now Section 1001, supra):

> "None of its provisions purport to or do have to do with exploratory searches as here made for the purpose of determining whether any agency has jurisdiction."

The Court of Appeals concluded, however, that since jurisdiction of the agency was specifically alleged in the indictment, this was sufficient to require a trial of the issue to determine from the proof whether the statements were made in a matter within the juris-

diction of the agency within the meaning of Section 80, supra.[6]

In the case at bar, not only is there no affirmative allegation in the indictment that the alleged falsification was made in a matter within the jurisdiction of the agency, but the proof shows that it was made in the course of an "exploratory search" under circumstances whereby any statement then made *could not be used in any matter or proceeding before the agency.*

Cases such as *Cohen v. United States,* (CA 9), 201 F.2d 386, (certiorari denied 345 U.S. 951, 73 S.Ct. 864, 97 L.Ed. 1374), and *Knowles v. United States,* (CA 10), 224 F.2d 168, are readily distinguishable since those cases involved the submission by the accused of false financial statements during the course of a regular proceeding to determine the matter of tax liability. Obviously, the financial statements in those cases were not only required by law to be furnished, but were submitted for the purpose of being used and considered by the officials with power to determine the matter in reaching a final decision upon the ultimate issue. For example, in the *Cohen* case the Treasury Department, which had been examining into the appellant's tax liability, had asked for a net worth statement to determine such liability. In a conference before the Treasury Department with appellant's tax adviser, the statement was discussed at great length and signed and filed by the taxpayer

[6]We are informed that after the above cited decision in that case the Government dismissed the charges.

as proof of his net worth. Obviously, there is no similarity between such a situation and that in the case at bar. The *Knowles* case, supra, involved a similar situation, i.e., a statement made in the course of an authorized inquiry into the correctness of the taxpayer's return. Circuit Judge Pickett, who decided the *Levin* case, supra, also participated in the Court of Appeals' decision in the *Knowles* case, and that Court placed its decision in the latter case "squarely upon the premise that the statement was made in pursuance of statutory requirements." Thus, these two decisions are not in conflict.

In the case at bar, the Court below also cited the case of *Marzani v. United States,* 168 F.2d 133 (affirmed by an equally divided Court—335 U.S. 895, 69 S.Ct. 299, 93 L.Ed. 431). The distinction between that case and such situations as are here presented is clearly stated by Circuit Judge Pickett in his opinion in the *Levin* case, supra, as follows:

> "On appeal the Court of Appeals pointed out that the proceeding in which the false statements were made was in the nature of an appeal from the request for a resignation. The false statements were made to an officer who had the authority to make a final disposition of the pending matter by one employed or entitled to employment by the United States. It is clearly distinguishable from a situation where the representative of the department or agency of the United States is merely collecting facts or information to determine whether any action shall be taken by that agency or department, or to sustain action which has been taken."

His Honor Judge Pickett also said in the opinion in the *Levin* case:

> "No decision has been found which holds that the failure to tell the truth to an agent or representative of a department or agency of the United States by a person under no legal obligation to speak, is a violation of Section 1001."

In the case at bar, the appellant was not only under no legal obligation to speak on the occasion referred to in the indictment, but any declaration made by him at that time under the circumstances in which the conversation took place could not possibly have been used or considered by the agency in making its determination; the governing regulations of the agency prohibited its use or its consideration in making that determination.

A perhaps extreme (but logical) example will illustrate the clear line of distinction between situations such as those in the *Levin* and *Stark* cases and the case at bar on the one hand, and those in the *Cohen* and *Marzani* cases on the other, and the equally clear distinction between power to investigate and jurisdiction to decide. If Section 1001 covers statements made to any employee authorized to investigate, regardless of the statement's relationship or lack of relationship to the function of decision, then it would follow that a speeding motorist in a National Park who might misstate his rate of speed to an intercepting Forest Ranger could be convicted thereunder and imprisoned for five years and fined $10,000 for that misstatement (a penalty greater than that provided

for perjury). It is such absurd consequences which were envisioned by the Court in the *Levin* case if the statute were to be broadly interpreted. On the other hand, the reasonable intent of Section 1001 would seem to be that it applies to any statement or representation made *in connection with or having some bearing upon an agency's function of decision* of some matter which is within its jurisdiction to determine.

We submit that for all the foregoing reasons, the proof failed to establish the offense charged. If we are correct in that conclusion, there is no need to consider the sufficiency of the indictment with regard to its second count. We shall, however, briefly point out authorities which we believe show beyond any doubt that the indictment is insufficient to charge an offense under that section.

(b) The sufficiency of the indictment.

> "An indictment is required to set forth the elements of the offense sought to be charged."
>
> *United States v. Debrow,* 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92.

> "The indictment must contain a definite statement of the essential facts constituting the offense charged."
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> * * * * * * *
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> "A bill of particulars may make specific a statement that is too general, but it cannot supply the omission from an indictment of a fact that

constitutes an essential element of the crime intended to be charged."

United States v. Williams, (CA 5), 203 F.2d 572, 574, (Cert. denied 346 U.S. 822, 74 S.Ct. 137, 98 L.Ed. 347).

"We are aware that liberality is the guide today in testing the sufficiency of an indictment, but this applies to matters of form and not of substance. We cannot dispense with the requirement that the indictment charge all essential ingredients of a crime. See Hagner v. United States, 285 U.S. 427, 433; 52 S.Ct. 417; 76 L.Ed. 861; U.S. v. Debrow, 346 U.S. 374, 376; 74 S.Ct. 113; 98 L.Ed. 92."

United States v. Tornabene et al., (CA 3), 222 F.2d 875, 878.

In the case at bar, the indictment alleges that the falsification or representation was made "to Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice" (T. 4). This is no more than stating that Anderson's occupation was that of an investigator of that agency. It is not alleged in terms that the representation was made in a matter within the jurisdiction of that agency, nor that when it was made to Anderson he was acting in a matter within the jurisdiction of that agency.

In *Lowe v. United States,* (CA 5), 141 F.2d 1005, the Court of Appeals reversed a judgment which had been entered on a plea of *nolo contendere* because the indictment did not state facts sufficient to show

that the misrepresentation was made in a matter within the jurisdiction of a department or agency of the United States.

Similarily, in *Hammer v. United States,* (CA 5), 134 F.2d 592, wherein the case had been tried in the Court below without a jury, it was also held that an indictment which did not charge facts sufficient to constitute a material concealment from a Government agency could not stand on appeal.

We have heretofore discussed the sufficiency of the proof to show that the statement or representation was made in a matter within the jurisdiction of the agency. We submit that the indictment by simply charging, without more, that the statement was made to Anderson, who was an investigator of the agency, is insufficient as an allegation of the necessary element that the statement must have been made in a matter within the jurisdiction of the agency. This is particularly true when it appears from the proof that the statement was one which by regulation could not have been used or considered in any determination to be made by the agency. We submit that this defect in the indictment is as to a matter of substance and not as to form, and that consequently the indictment is fatally defective in that respect.

CONCLUSION.

The gravity of the legal issues presented by this case, and the seriousness of its consequences to appellant, are apparent. Broadly, the issues are whether

a person (a) can legally be convicted of *wilfully* violating a criminal statute on the basis of uncontradicted evidence which shows no more than carelessness (however "brash"—T. 8) in signing a business document in a somewhat routine manner, and (b) can legally be convicted (and imprisoned for a long term) because he told an untruth to an investigator in an informal conversation which under the applicable law and regulations could not be used or considered in determining any issue presented to the Government agency involved, in any matter within its jurisdiction to decide.

The conviction must stand or fall on the basis of those two specific acts on the part of appellant. We earnestly submit that under the circumstances shown by the evidence in this case, neither act, as a matter of law, constituted a violation of the penal statutes involved.

It is respectfully submitted that the judgment of the Court below should be reversed.

Dated, Stockton, California,
December 1, 1956.

Respectfully submitted,

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